

OCT 20 1978

MICHAEL R. RYAN, JR., CLERK

In The

**Supreme Court of the United States**

October Term, 1978

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No. 78-156

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UNITED STATES OF AMERICA,

*Petitioner,*

—v—

HUGH J. ADDONIZIO,

*Respondent.*

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UNITED STATES OF AMERICA,*Petitioner,*

—v—

THOMAS J. WHELAN and THOMAS M. FLAHERTY,

*Respondents.*

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**BRIEF OF RESPONDENTS THOMAS J. WHELAN AND  
THOMAS M. FLAHERTY, IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
THIRD CIRCUIT.**

GREENSPAN &amp; JAFFE

*Attorneys for Respondents,*

Thomas J. Whelan and

Thomas M. Flaherty

180 East Post Road

White Plains, New York 10601

(914) 946-2500

LEON J. GREENSPAN

JOSEPH D. DeSALVO

Of Counsel

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## QUESTION PRESENTED

Whether the sentencing Court has jurisdiction pursuant to the post-sentencing relief of 28 U.S.C. §2255 upon a showing that the sentencing Judge's expectations were frustrated by the subsequent changes in criteria considered by the Parole Commission granting or denying release, which changes fundamentally altered the criteria previously applied in the parole decision-making process employed by the Parole Commission.

## STATEMENT

### A. THE PAROLE RELEASE SYSTEM

Subsequent to respondents' sentencing in August of 1971, the Parole Commission substantially changed the criteria and procedure originally applied to parole determination. The extent of this criteria and procedure, together with its ramifications on the matter in issue before this Court is extensively discussed on pages 2 through 4 of the Brief in Opposition of Respondent Hugh J. Addonizio. Respondents Whelan and Flaherty respectfully endorse the same.

### B. FACTUAL BACKGROUND IN THE CASE OF U.S.A. v. THOMAS J. WHELAN AND THOMAS M. FLAHERTY

Respondents Whelan and Flaherty were sentenced to 15 years imprisonment on October 10, 1971 by Judge Shaw in the United States District Court for the District of New Jersey at Newark after having been convicted of two counts of conspiracy to commit extortion and 27 counts of extortion in violation of 18 U.S.C. 1951 and 1952. At the time respondents were sentenced the Federal parole determination guidelines had not been adopted by the Parole Commission. Both respondents Whelan and Flaherty were sentenced pursuant to 18 U.S.C. 4205(a) and thereby became eligible for parole in June of 1976.

Respondents had served in excess of 50 months in Federal custody at the time of their first hearing for parole determination.

The respondents' prison records were undisputably classified as exemplary. Their records regarding their adjustment to program, process and rehabilitation were outstanding. As a result of the stability demonstrated by both respondents, it was clearly apparent that no recidivistic tendencies were present in either respondents' record. Their behavioral pattern demonstrated the fact that they would be of no danger to society if they were to be released on parole. Nevertheless, on June 12, 1976, the National Parole Commission denied parole to the respondents, and continued them for a regular review hearing in June of 1978.

The reasons given by the Parole Commission for the denials of parole made it clear that its decision was based upon its own evaluation of the nature and circumstance, that is the severity, of the respondents' offense. The respondents accordingly appealed the parole determination to the National Appellate Board on October 18, 1976. Upon receipt of the Appellate Board's affirmation of the June 12th parole denial, respondents commenced a Habeas Corpus proceeding pursuant to Title 28 U.S.C. §2255 in the United States District Court for the District of New Jersey on November 22, 1976.

On March 3, 1977, United States District Court Judge Biunno denied the respondents' applications on the grounds that the Court had no jurisdiction to make a determination on the issues before it. Judge Biunno specifically rejected the Third Circuit authority of *United States v. Salerno*, 538 F.2d 1005, reh. den. 542 F.2d 628 (3rd Cir. 1976) and *United States v. Somers*, 552 F.2d 108 (3rd Cir. 1976). He additionally suggested that the proper forum for the respondents' application was the Middle District of Pennsylvania, the District in which the respondents were incarcerated.

Respondents accordingly appealed the Biunno decision and order to the United States Court of Appeals for the Third Circuit, and simultaneously commenced a Habeas Corpus proceeding pursuant to 28 U.S.C. §2241 in the United States District Court for the Middle District of Pennsylvania. In September of 1977, Judge Muir denied respondents' petition for Habeas Corpus. The District Judge further indicated that the proper forum for the respondents' application was the District of New Jersey. Respondents thereafter appealed to the United States Court of Appeals for the Third Circuit, where the Pennsylvania appeal was consolidated with the New Jersey appeal and then jointly heard with the Addonizio appeal taken by the Government.

### C. THE DECISION OF THE COURT OF APPEALS

The United States appealed from the reduction of the Addonizio sentence while respondents Whelan and Flaherty appealed from the denial of relief in both New Jersey and Pennsylvania. The Third Circuit, in its decision, determined that the District of New Jersey had jurisdiction to vacate and correct the respondents' sentences under the particular circumstances of the case. Following its earlier decisions, the Third Circuit held that relief may be granted to an inmate, where the import of the original sentence had been substantially changed as a result of the application by the Parole authorities of a set of guidelines and procedures not in existence at the time of sentencing, and where those new guidelines and procedures actually frustrated the reasonable intention and expectations of the Sentencing Judge at the time of sentencing. The decision of the Third Circuit specifically rejected the reasoning of Judge Biunno's jurisdictional denial of respondents' application. The Third Circuit remanded the respondents' application to Judge Biunno for reconsideration on the merits in light of the comment set forth in the Circuit Court decision.



## REASONS FOR DENYING THE PETITION

The primary thrust of Petitioner's application for certiorari centers around the proposition that the decision of the Third Circuit is in direct conflict to the Circuit Court opinions of the First, Second, Sixth, Seventh and Ninth Circuits. While respondents do not dispute that there is a conflict in the Circuits regarding this issue, it is respondents' position that conflict between jurisdiction, standing by itself, does not satisfy the jurisdictional requirement for certiorari. Rule 19(1)(b) of the Revised Rules of the Supreme Court of the United States states:

"A review on certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following *while neither controlling nor fully measuring the Court's discretion* indicate the character of reasons which will be considered:

"(b) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter;..." (emphasis added)

Under color of the above Rule this Court usually will grant certiorari where the decision of the Federal Court of Appeals, as to which review is sought, is in direct conflict with the decision of another Court of Appeals on the same matter of Federal law, or on the same matter of general law as to which Federal Courts can exercise independent judgments. Therefore, a square and irreconcilable conflict ordinarily will be enough to secure review.

Despite this basic premise there is increasing evidence that the existence of a conflict, without more, is not always enough to convince the Court that certiorari should be granted. Evidence of this changing trend is contained in the words of Mr. Justice Harlan, where he stated:

"Even where a 'true' conflict may be said to exist, certiorari will sometimes be denied where it seems likely that a conflict may be resolved as a result of future cases in the Court of Appeals, or where the impact of the conflict is narrowly confined, and is not apt to have continuing future consequences, as where a statute which has given rise to conflicting interpretation has been repealed or is to expire. The nub of all these qualifications is that a conflict of decision may be safely relied on as a ground for certiorari only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the Supreme Court alone."

(*Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Aust. L.J. 108 (1959) ).

A review of this Court's denials of certiorari and subsequent dismissals of the grant of certiorari after certiorari had been granted, reveals this Court's concern that something more than mere conflict between Circuit Courts exist in order for certiorari to be granted.

The granting of certiorari is a judicial determination and not an administrative function. The quality of the petition must be carefully weighed by the Court. *The Monrosa v. Carbon Black Exports, Inc.*, 359 U.S. 180, 184; 79 S.Ct. 710, 713; 3 L.Ed. 2d 723 (1959). This Court, in dismissing certiorari, in the above cited case stated:

"While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflict between the Courts of Appeals is judicial, not simply administrative or managerial."

In *United States v. Abrams*, 197 F.2d 803 (6th Cir. 1952); cert. den. 344 U.S. 855; 73 S.Ct. 92; 97 L.Ed. 664 (1952), this Court denied certiorari despite the fact that the finding of the Sixth Circuit was in direct conflict with determinations rendered by the Third Circuit and the respondent acknowledged the conflict.

Similarly, there have been numerous cases reviewed by this Court wherein certiorari was dismissed after certiorari had first been granted. The common thread in each of these cases was first discussed in *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393; 43 S.Ct. 422, 423; 63 L.Ed. 712 (1923), where this Court stated that:

"Certiorari is granted only in cases involving principles, the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

See also *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498; 71 S.Ct. 453, 95 L.Ed. 479; *U.S. v. Jordan*, 342 U.S. 388, 396; 72 S.Ct. 286, 287; 96 L.Ed. 321 (1952); *McAllister v. U.S.*, 348 U.S. 19, 25; 75 S.Ct. 6, 10, 99 L.Ed. 2 (1954); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S., 70, 79; 75 S.Ct. 614, 619-620; 99 L.Ed. 897 (1955). Respondents acknowledge that a conflict in circuits does exist. However, the additional elements necessary in order to grant certiorari do not exist in the instant case. The implications of the Third Circuit decision are personal to the litigants, extremely narrow and limited in scope. The Third Circuit deliberately and cautiously restricted its holding to those types of cases where the sentence was imposed prior to the publication of the new guidelines in 1973, and where it could be clearly established that the new guidelines and procedures resulted in requiring the inmate to serve an appreciably longer term of imprisonment than could have been reasonably expected or intended at the time of the imposition of sentence.

Despite the fact that petitioner's application demonstrates an acknowledged conflict in jurisdiction, it is patently defective in establishing the fact that the matter posed for consideration is of importance to the public as distinguished from its prime importance to the parties. In addition, petition fails to establish, that the Third Circuit opinion is apt to have substantial continuing future consequences that can only be resolved by Supreme Court intervention. The two cases presented to this Court clearly lack the essential special circumstances which must exist in order for certiorari to be granted, despite the patent conflict of circuits.

### CONCLUSION

The petition for Writ of Certiorari should be denied.

Dated: White Plains, New York  
October 13, 1978

Respectfully submitted,

GREENSPAN & JAFFE  
Attorneys for Respondents  
Thomas J. Whelan and  
Thomas M. Flaherty  
180 East Post Road  
White Plains, New York 10601  
(914) 946-2500

LEON J. GREENSPAN  
JOSEH D. DeSALVO  
Of Counsel.